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PRACTICE & PROCEDURE

I. COURT LIBERALLY APPLIES RULES OF CIVIL PROCEDURE TO CASE OF MISNAMED DEFENDANT

In *Hughes v. Water World Water Slide, Inc.*[1] the South Carolina Supreme Court considered the problem of a misnamed defendant in a civil action, holding that the amendment to an original summons and complaint correcting the name of a corporate defendant related back to the filing of the original complaint under Rule 15(c) of the South Carolina Rules of Civil Procedure. In so holding, the court declined to follow the United States Supreme Court ruling in *Schiavone v. Fortune*[2] which applied Rule 15(c) of the Federal Rules of Civil Procedure to a similar set of facts, even though the federal rules at the time of *Shiavone* consisted of the same text as the current South Carolina rule.[3] Although the amendment to the pleadings and service on the correctly-named defendant occurred after the running of the statute of limitations, the court found that the defendant had received notice of the action "within the period prescribed by law" as required by Rule 15(c).[4]

The *Hughes* court also upheld a previous ruling that the provisions of Rule 3(b) of the South Carolina Rules of Civil Procedure apply to all defendants.[5] Rule 3(b) permits a plaintiff to meet the service requirement for commencing a civil action by delivering the filed summons and complaint to the sheriff of the county in which the defendant or a designated agent of a defendant corporation usually or last resided.[6] The court disregarded the title to Rule 3(b) which read "Commencement When Defendant Absent." The title has since been amended to read "Tolling of the Statute of Limitations."[7]

The plaintiff, a police officer, was injured when he fell in a hole on the premises of the defendant corporation while pursuing a burglar on August 12, 1988.[8] On August 12, 1991, the last day of the statute of limitations period, the plaintiff filed a summons and complaint which named the defendant as Water World Water Slide, Inc. The plaintiff's attorney delivered a copy of the summons and complaint to the sheriff's office of Horry County for service upon the defendant, a resident corporation whose correct name is Wet World,

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1. ___ S.C. ___, 442 S.E.2d 584 (1994).
2. 477 U.S. 21 (1986).
3. *Hughes*, ___ S.C. at ___, 442 S.E.2d at 586.
4. *Id.* at ___, 442 S.E.2d at 586.
5. *Id.* at ___, 442 S.E.2d at 586 (citing Garner v. Houck, ___ S.C. ___, 435 S.E.2d 847 (1993)).
6. S.C. R. CIV. P. 3(b).
7. S.C. R. CIV. P. 3 notes to 1994 amendments.
8. *Hughes*, ___ S.C. at ___, 442 S.E.2d at 585.

Inc. On August 15, 1991, the summons and complaint were served upon the corporation's president, who had been on the premises the night of the plaintiff's accident.[9]

In determining the corporation's name for the purpose of filing his complaint, the plaintiff relied on the name appearing on the sign in front of the defendant's building and on the reference to the defendant by its insurance company as Waterworld Waterslide.[10] The defendant moved for dismissal on the grounds that the summons and complaint did not properly contain the names of the parties.[11] The plaintiff filed an amended summons and complaint on October 28, 1991, naming Wet World, Inc. as the defendant.[12]

In holding that the application of Rule 3(b) is not limited to absent defendants, the court adhered to its recent decision on this issue in *Garner v. Houck*.[13] In *Garner* the plaintiff filed a summons and complaint in a wrongful death and survival action and delivered a copy to the sheriff for service within the statute of limitations period. The sheriff served the summons and complaint on the defendant doctors and hospital three days later, after the statute had run.[14] Because of the heading of Rule 3(b), which read "Commencement When Defendant Absent," the lower court dismissed the complaint, finding that, in order for the delivery of the pleadings to the sheriff to effect service and toll the statute of limitations, the plaintiff was required to show that the defendants were absent from the county at the time of delivery.[15] The supreme court reversed the lower court's decision and overruled any conflicting dicta on this issue in *Able v. Schweitzer*[16] and *Dandy v. American Laundry Machinery, Inc.*[17] In these cases, the court had held that delivering service to a private server rather than the sheriff did not fall within the ambit of Rule 3(b).

The court in *Garner* based its decision on the rule of statutory construction that although the heading of a section is part of the statute, it may not be construed to limit or undo the plain meaning of the text and is of interpretive use only to resolve ambiguities in the statutory language.[18] The court noted

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9. *Id.* at ___, 442 S.E.2d at 585.

10. *Id.* at ___, 442 S.E.2d at 585. Although the *Hughes* opinion states that the insurer referred to its insured as "Wet World Waterslide," the record indicates that the insurer's reference was actually to "Waterworld Waterslide." Record at 17.

11. *See* Record at 10-11.

12. *Hughes*, ___ S.C. at ___, 442 S.E.2d at 585.

13. ___ S.C. ___, 435 S.E.2d 847 (1993).

14. *Id.* at ___, 435 S.E.2d at 848.

15. *Id.* at ___, 435 S.E.2d at 849.

16. 300 S.C. 322, 321, 387 S.E.2d 697, 697 (Ct. App. 1989).

17. 301 S.C. 24, 26, 389 S.E.2d 866, 867-68 (1990).

18. *Garner*, ___ S.C. at ___, 435 S.E.2d at 849 (citing Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 528-29 (1947)).

that the text of Rule 3(b) does not limit its application to absent defendants and instead explicitly includes corporate defendants that "cannot be absent."[19] The court concluded that not only does the text of Rule 3(b) lack ambiguity, but applying the language of the heading to limit the rule would create ambiguities in its construction. For instance, the courts would be left to determine whether the defendant must be absent from his dwelling, the county, or the state, and precisely when this absence would trigger the rule.[20] The court noted further that the statute which Rule 3(b) was intended to replace, South Carolina Code of Laws section 15-3-10,[21] was not limited to absent defendants.[22]

The court in *Hughes*, following its decision in *Garner*, held that when the plaintiff delivered the pleadings to the sheriff in the county where the defendant resided, the statute of limitations was tolled, without regard to the defendant's presence or absence.[23]

The *Hughes* court reasonably refused to limit the tolling provision of Rule 3(b) to absent defendants because of the purpose of the rule and policy considerations underlying the rule. Under Rule 3(a) of the South Carolina Rules of Civil Procedure, the commencement of an action requires both the filing and service of the summons and complaint. The federal rules require only filing a complaint to commence the action in federal question cases,[24] allowing a 120 day period for service of the pleading.[25] Many state rules also allow filing alone to commence the action or allow either filing or service of the pleadings to be sufficient for commencement.[26]

South Carolina's requirement of service to toll the statute of limitations could create a hardship on the plaintiff if the plaintiff is not also given some ability to control service of the pleadings. The purpose of Rule 3(b) is to ensure the plaintiff an avenue of effective service.[27] By allowing the plaintiff

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19. *Id.* at ___, 435 S.E.2d at 849-50.

20. *Id.* at ___, 435 S.E.2d at 850.

21. S.C. CODE ANN. § 15-3-10 (Law. Co-op. 1976) (repealed 1985).

22. *Garner*, ___ S.C. at ___, 435 S.E.2d at 850. The court cited for comparison § 15-3-30 of the South Carolina Code of Laws, which addresses the effect of an absent defendant on both the accrual of an action and the tolling of the statute of limitations under certain circumstances.

23. *Hughes*, ___ S.C. at ___, 442 S.E.2d at 585.

24. FED. R. CIV. P. 3. In diversity cases, the federal courts must follow the state rule. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

25. FED. R. CIV. P. 4(m).

26. *See, e.g.*, N.C. GEN. STAT. § 1A-1, Rule 3(a) (1990).

27. *See* Jensen v. Doe, 292 S.C. 592, 594, 358 S.E.2d 148, 149 (Ct. App. 1987) (holding that section 15-3-10, which was replaced by Rule 3(b), was not intended to provide for substituted service or acquiring personal jurisdiction, but only to create an additional method of tolling the statute of limitations), *cert. denied*, 295 S.C. 69, 367 S.E.2d 162 (1988). This protection was of greater concern when § 15-3-10 was enacted in 1870 than it is today because obtaining personal service was more difficult at that time. *See also* S.C. CODE ANN. § 15-3-30 (Law. Co-op. 1976)

to deliver service to the sheriff of the county where the defendant usually or last resided, the rule prevents the defendant from defeating the plaintiff's cause of action by evading service. When Rule 3(b) replaced South Carolina Code section 15-3-10, the requirement that actual service be accomplished within a reasonable time after delivery to the sheriff was added to protect the defendant's interest in timely notice of the claim.[28] These competing interests of the parties are valid regardless of whether the defendant is present or absent. Although a proof of absence requirement would incur the difficulties in interpreting "absent" mentioned by the court,[29] the court could have construed Rule 3(b) to require a good faith attempt to serve the defendant before delivery of service to the sheriff. However, the court's decision recognizes the purpose of Rule 3(b) and furthers the policy that courts prefer a decision on the merits rather than on procedural technicalities.

The court followed precedent in construing Rule 3(b) without giving undue weight to its title. Although the former heading of the section seemed to indicate that the legislature intended to limit the application of Rule 3(b) to absent defendants, there is no further evidence of this intent in the body of the rule or in the notes. Indeed, in the 1994 amendment the misleading heading of Rule 3(b) was changed to "Tolling of the Statute of Limitations" to reflect the court's decision in *Garner v. Houck*.[30]

The *Hughes* court next considered whether the amended summons and complaint related back to the date of the original pleading, which had effectively commenced the action within the statute of limitations period. Rule 15(c) of the South Carolina Rules of Civil Procedure allows a plaintiff to amend a complaint after the deadline for the statute of limitations. South Carolina Rule 15(c) uses the language of the pre-1991 Rule 15(c) of the Federal Rules of Civil Procedure. It allows relation back when the "claim or defense asserted in the amended pleading arose out of the [same] conduct, transaction or occurrence" as that in the original pleading. Where the amendment changes the name of the party against whom the claim is asserted, the amended claim relates back if the foregoing provision is satisfied and if:

> *within the period provided by law for commencing the action* against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his

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service was more difficult at that time. *See also* S.C. CODE ANN. § 15-3-30 (Law. Co-op. 1976) (tolling the statute of limitations when defendant is out of state).

28. *See* S.C. R. CIV. P. 3 notes. An unresolved issue that may arise in the future is what period should be considered a reasonable time.

29. *See supra* note 20 and accompanying text.

30. S.C. R. CIV. P. 3 notes to 1994 amendments; *see also* S.C. CONST. art. III, § 17 ("Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.").

> defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.[31]

Prior to the 1991 amendments, the United States Supreme Court interpreted Federal Rule 15(c) in *Schiavone v. Fortune*.[32] In *Schiavone* the plaintiff filed a complaint within the state statute of limitations period, naming Fortune as the defendant. Fortune was the name of a magazine and a division of Time, Inc., but was not a separate legal entity and lacked capacity to be sued. The plaintiff amended the complaint after the running of the statute but within the 120 day period allowed for service by Rule 4 of the Federal Rules of Civil Procedure.[33] The United State Supreme Court affirmed the dismissal of the action, holding that Federal Rule 15(c) required the plaintiff to meet the notice criteria within the "prescribed limitations period."[34] The Court specifically and narrowly interpreted "the period provided by law for commencing the action" to mean the state statute of limitations period.[35]

While approving the four-pronged analysis set forth in *Schiavone* to analyze the requirements of Rule 15(c), the *Hughes* court declined to follow the Supreme Court's interpretation of "within the period provided by law for commencing the action." The South Carolina court found that the rule in *Schiavone* is inconsistent with Rule 8(f) of the South Carolina Rules of Civil Procedure,[36] which requires that "[a]ll pleadings shall be so construed as to do substantial justice to all parties."[37] The court noted that Congress amended Federal Rule 15(c) to include Rule 4's additional time period for service of pleading in the time period allowed for defendant to receive notice of the claim. The court cited the Advisory Committee's Note to the 1991 federal rules amendment, which states that Rule 15(c) was revised after *Schiavone v. Fortune* because the result was "inconsistent with the liberal pleading practices secured by Rule 8."[38] Federal Rule 8 is substantively the same as South Carolina Rule 8(f).[39] Although South Carolina Rule 15(c) had not been amended to correspond with the federal rule, the court read the South Carolina rule to be consistent with the Advisory Committee's Note to the amended federal rule.

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31. S.C. R. CIV. P. 15(c) (emphasis added).

32. Schiavone v. Fortune, 477 U.S. 21, 25 (1986).

33. *Id.* at 27-28.

34. *Id.* at 29.

35. *Id.* at 30-31.

36. *Hughes*, ___ S.C. at ___, 442 S.E.2d at 586.

37. S.C. R. CIV. P. 8(f).

38. FED. R. CIV. P. 15 advisory committee's note to 1991 amendment; *see Hughes*, ___ S.C. at ___, 442 S.E.2d at 586.

39. *See* FED. R. CIV. P. 8(f).

In South Carolina, Rule 3(b) provides for a reasonable time period for actual service of the pleadings upon the defendant after the delivery of the summons and complaint to the sheriff of the county in which the defendant resides.[40] Therefore, the court in *Hughes* held that the defendant received actual notice of the claim within the period allowed by law when the pleadings were served upon the president of the defendant corporation during the reasonable time period for service.[41] Moreover, both parties agreed that by the service of the summons and complaint with the incorrect corporate name, the defendant received notice such that it would "'not be prejudiced in maintaining its defense'" and that the defendant "'must or should have known that, but for a mistake concerning [its] identity, the action would have been brought against it'" as required by Rule 15(c).[42]

The court further noted that the president of the corporation was present at the time of the injury from which the claim arose and that the incorrect name on the summons and complaint was a trade name used by the defendant.[43] Because the court determined that the "period allowed by law" included the reasonable time for service, it held that the plaintiff's amended claim to correct the defendant's name related back to the date the original pleading was filed and delivered to the sheriff, within the statute of limitations period. The court found that the plaintiff met the requirements of Rules 3(b) and 15(c) as interpreted in its opinion, and reversed the lower court's dismissal of the action.[44]

Despite the fact that South Carolina had not adopted the revised Federal Rule 15(c), the court in *Hughes* applied the rationale behind the provisions of the rewritten federal rule. The court declined to follow the United States Supreme Court's interpretation of the "plain language" of the text of Rule 15(c) in *Schiavone v. Fortune.*[45] Prior to *Schiavone*, federal courts were divided on whether "the period provided by law for commencing the action" included a reasonable time for service.[46] In 1985 the Fourth Circuit Court of Appeals reached the same conclusion as the *Schiavone* Court, holding that notice was required strictly within the statute of limitations period.[47]

In addition to relying on the revised federal rule, the *Hughes* court emphasized the equities of the case and the policy embodied in Rule 8(f) of the

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40. S.C. R. CIV. P. 3(b).

41. *Hughes*, ___ S.C. at ___, 442 S.E.2d at 586.

42. *Id.* at ___, 442 S.E.2d at 586.

43. *Id.* at ___, 442 S.E.2d at 586.

44. *Id.* at ___, 442 S.E.2d at 586.

45. 477 U.S. 21, 30 (1986) ("The choice . . . is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.").

46. *See* 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1498, at 107-13 (2d ed. 1990).

47. Weisgal v. Smith, 774 F.2d 1277, 1279 (4th Cir. 1985).

South Carolina Rules of Civil Procedure, citing *Russell v. City of Columbia*.[48] In *Russell* the court stated that "pleadings in a case should be construed liberally so that substantial justice is done between the parties"[49] and further, that "a judgment on the pleadings is considered to be a drastic procedure by our courts."[50] However, the Court in *Schiavone* specifically considered the text of Federal Rule 8(f): "'All pleadings shall be so construed as to do substantial justice.'"[51] Additionally, the Court viewed its previous rulings as consistently upholding the premise that "the spirit and inclination of the rules favored decisions on the merits. . . ."[52] Despite these considerations, the Court resolved not to "temper the plain meaning of the language by engrafting upon it an extension of the limitations period equal to the asserted reasonable time . . . for the service of a timely filed complaint."[53]

Although *Hughes* can be distinguished from *Schiavone* because the plaintiff in *Hughes* made a good faith effort to determine the correct name of the corporation, in both cases the correct defendant had actual notice of the claim within the reasonable time allowed for service after the statute of limitations period.[54] The Court in *Schiavone* stated that notice within the limitations period was the linchpin to Rule 15(c) and that the seeming arbitrariness associated with the limitations period was imposed by the legislature rather than the courts.[55] The dissent in *Schiavone* pointed out that the purpose of Rule 15(c) is to enable the plaintiff to correct an error in the complaint after the statute of limitations has run when the defendant will not be prejudiced.[56] The notice requirements were added to the rule in 1966 to prevent prejudice to the defendant, but the majority's narrow construction of these requirements served to penalize the plaintiff for a harmless pleading error, a mere technicality.[57]

The holding in *Schiavone v. Fortune* was widely criticized prior to the 1991 amendment to Federal Rule 15 because it encouraged decisions on the

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48. 305 S.C. 86, 406 S.E.2d 338 (1991).

49. *Id.* at 89, 406 S.E.2d at 339 (citing Manning v. Dial, 271 S.C. 79, 84, 245 S.E.2d 120, 123 (1978)).

50. *Id.* (citing United States Casualty Co. v. Hiers, 233 S.C. 333, 339, 104 S.E.2d 561, 564 (1958)).

51. *Schiavone*, 477 U.S. at 27.

52. *Id.* (citing Conley v. Gibson, 355 U.S. 41, 48 (1957)); *see also* Foman v. Davis, 371 U.S. 178, 181 (1962) (refusing to apply a technicality to deny petitioner's motion for appeal).

53. *Schiavone*, 477 U.S. at 30.

54. *Hughes*, ___ S.C. at ___, 442 S.E.2d at 585-86; *Schiavone*, 477 U.S. at 30, 33.

55. *Schiavone*, 477 U.S. at 31. *But see* Joseph P. Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 728 n.41 (1988).

56. *Schiavone*, 477 U.S. at 38 (Stevens, J., dissenting).

57. *Id.* at 39.

pleadings rather than the merits of a case[58] and because it created an anomalous result.[59] Under the old Federal Rule 15, a defendant properly named in a timely filed pleading might receive notice of the action up to 120 days after the statute of limitations had run because Federal Rule 4 allows the plaintiff this time period for service. However, if a plaintiff misidentified the defendant or made an error in the name of the defendant in the timely filed complaint, the amended complaint would not relate back to the date of the original pleading unless the defendant was also served within the limitations period. Thus, for example, a defendant served five days after the deadline for the statute of limitations would prevail if the complaint contained a misnomer, but a correctly named defendant could have no notice of the action for four months without being prejudiced. Accordingly, the result in *Hughes* can be viewed as a response to the inequity of the result in *Schiavone,* as can Congress' 1991 amendment to Federal Rule 15(c).[60]

The dissent in *Schiavone* also asserted that Rule 15(c) was designed to protect against a misidentification of the defendant, which required bringing in a new party, rather than to protect against a misnomer.[61] The notice requirement in Rule 15(c) applies when the amendment changes the party against whom the claim is asserted.[62] In *Schiavone*, the amendment arguably effected a change of parties from a division of the corporation, Fortune, to the corporation, Time, Inc., although the two had a common interest. On the other hand, the mistake in the original pleading in *Hughes* falls into the misnomer category. "A misnomer is involved when the correct party was served so that the party before the court is the one plaintiff intended to sue, but the name or description of the party in the complaint is deficient in some respect."[63]

The court in *Hughes* did not explicitly make the distinction between misnomer and misidentification. In two recent South Carolina cases, however, the court held that a misnomer was correctable by amendment after a judgment had been entered.[64] In *Griffin v. Capital Cash* the court held that when a defendant corporation is designated in the pleading by its trade name and properly served, even failure to amend the complaint to correct the corporate name "does not invalidate the process or the judgment where the misnomer causes the corporation no prejudice."[65] The rationale for this distinction is

58. *See* 6A WRIGHT ET AL., *supra* note 46, at 114.

59. *See* G.F. Co. v. Pan Ocean Shipping Co., 23 F.3d 1498, 1501 (9th Cir. 1994).

60. FED. R. CIV. P. 15 advisory committee's note to 1991 amendment.

61. *Schiavone*, 477 U.S. at 35-36 (Stevens, J., dissenting).

62. 6A WRIGHT ET AL., *supra* note 46, at 126.

63. 6A *id.* at 130.

64. *See* Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779 (1991); Griffin v. Capital Cash, ___ S.C. ___, 423 S.E.2d 143 (Ct. App. 1992).

65. *Griffin*, ___ S.C. at ___, 423 S.E.2d at 146 (citing United States v. A.H. Fischer Lumber Co., 162 F.2d 872, 873 (4th Cir. 1947) ("If it names them in such terms that every intelligent

that when a defendant has been properly served but simply misnamed in the pleadings, the party against whom the claim is brought has received notice as if there were no mistake and, thus, is not prejudiced. Other jurisdictions have held that an amendment to correct a misnomer is not subject to the notice requirement of Rule 15(c) and, therefore, is unaffected by the result in *Schiavone*.[66]

Because the amendment in *Hughes* was to correct a mistake in the properly served defendant's corporate name rather than to change or add defendants, the court could have based its decision on the mistake-misnomer distinction. However, a careful reading of the rationale employed by the court indicates that in cases of either misidentification or misnomer, it will construe Rule 15(c) liberally to the extent that the rule does not work to prejudice the defendant. Similarly, in its amendment to Federal Rule 15(c), the Supreme Court attempted to make the rule work equitably for both the plaintiff and the defendant by providing that "[i]f the notice requirement is met within the [service] period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification."[67]

The court in *Hughes* upheld its previous ruling that an action is commenced, and the statute of limitations is tolled, by delivery of service to the sheriff without regard to the defendant's absence. This interpretation of Rule 3(b) of the South Carolina Rules of Civil Procedure provides the plaintiff a sure means of effective service while protecting the defendant's interest in timely notice of the claim.

South Carolina Rule 15(c) allows an amendment to pleadings that changes the name of a party against whom the claim is brought to relate back to the date of the original claim if the defendant has sufficient notice of the action "within the period provided by law for commencing the action."[68] Following the rationale behind the 1991 amendment to Rule 15(c) of the Federal Rules of Civil Procedure, the *Hughes* court held that this period includes the reasonable time for service after the pleadings have been delivered to the sheriff. The court's interpretation of Rule 15(c) allows the plaintiff to correct a mistake in the complaint without prejudice to the defendant, providing the same notice period for properly named and misnamed defendants.

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person understands who is meant . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.")).

66. *See, e.g.*, Pritchett v. Stillwell, 604 A.2d 886 (D.C. 1992); Wathen v. Greencastle Skate Place, Inc., 606 N.E.2d 887 (Ind. Ct. App. 1993).

67. FED. R. CIV. P. 15 advisory committee's note to 1991 amendment.

68. S.C. R. CIV. P. 15(c).

II. COURTS EXAMINE USE OF PEREMPTORY CHALLENGES

In two recent decisions, the South Carolina Supreme Court and the South Carolina Court of Appeals re-examined the use of peremptory challenges in jury selection[1] under the rule established by the United States Supreme Court in *Batson v. Kentucky*.[2]

In *Sumpter v. State*[3] the South Carolina Supreme Court made two noteworthy rulings. First, the court found that the explanation given by a solicitor for striking a black juror—that he had struck the juror earlier in the week in a different case—was a "race neutral" reason for striking him again.[4] Second, the court held that a black appellant had failed to show that the prosecutor's explanation for striking a second black juror—because of the latter's prior "involvement" with a DUI charge—was pretextual,[5] even though a white juror was seated who had a prior DUI conviction.[6]

In *Foster v. Spartanburg Hospital System*[7] the South Carolina Court of Appeals examined a number of reasons offered by the defendant to explain why it used all of its peremptory challenges to remove four of the five potential black jurors from the panel. In addition to finding a number of the reasons pretextual, the court held that "a sweeping generalization about

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1. The classic definition of a peremptory challenge was given by Blackstone: "an arbitrary and capricious [s]pecies of challenge to a certain number of jurors, without [s]hewing any cau[s]e at all." 4 WILLIAM BLACKSTONE, COMMENTARIES *346. He offered two reasons for the existence of this type of challenge. First, recognizing both "what [s]udden impre[ss]ions and unaccountable prejudices we are apt to conceive upon the bare looks and ge[s]tures of another," and the necessity that a prisoner have a good opinion of his jury, the common law refused to let him "be tried by any one man again[s]t whom he has conceived a prejudice, even without being able to a[ss]ign a rea[s]on for [s]uch his di[s]like." *Id.* at *347. Second, it was viewed as a way of protecting the defendant from the possible harm that could result from a failed challenge for cause, because the "bare que[s]tioning of [a juror's] indifference may [s]ometimes provoke a re[s]entment." *Id.*

2. 476 U.S. 79 (1986).

3. ___ S.C. ___, 439 S.E.2d 842 (1994).

4. *Id.* at ___, 439 S.E.2d at 844.

5. In State v. Oglesby, 298 S.C. 279, 379 S.E.2d 891 (1989), the South Carolina Supreme Court ruled that, even though a reason for striking a black juror had been "sufficiently neutral to withstand the *Batson* inquiry," it was "proven to be a pretext because it was not applied in a neutral manner." *Id.* at 281, 379 S.E.2d at 892; *see also* State v. Robinson, 305 S.C 469, 473, 409 S.E.2d 404, 407 (1991) (observing that "the burden is on the defendant to prove that the Solicitor's neutral reasons for his strikes were pretextual because they were not applied in a neutral manner"), *cert. denied*, 503 U.S. 937 (1992); Chavous v. Brown, 299 S.C. 398, 385 S.E.2d 206 (Ct. App. 1989) (finding discrimination where defendant in civil case struck black female jurors because they were young but seated white females who were even younger), *rev'd*, 302 S.C. 308, 396 S.E.2d 98 (1990), *vacated*, 501 U.S. 1202, *aff'd per curiam on remand*, 305 S.C. 387, 409 S.E.2d 356 (1991).

6. *Sumpter*, ___ S.C. at ___, 439 S.E.2d at 844.

7. ___ S.C. ___, 442 S.E.2d 624 (Ct. App. 1994).

members of an entire political party [is] not . . . [a] reasonable, race neutral explanation" and thus does not satisfy an inquiry under *Batson*.[8]

In *Batson v. Kentucky*[9] the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment[10] prohibits peremptory challenges of prospective jurors based solely on account of their race.[11] The Court set forth a three-step procedure, derived from its cases dealing with charges of intentional discrimination under Title VII, for courts to use in deciding whether a peremptory strike is unconstitutional.[12] A defendant must first establish a prima facie case of intentional discrimination by showing that he "is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." The defendant may rely on the fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'" in order to meet his burden of showing that the circumstances "raise an inference" of intentional racial discrimination.[13] Once the prima facie case is made, the burden shifts to the prosecutor to provide a "neutral explanation" for the strikes. While rebuttal need not "rise to the level justifying exercise of a challenge for cause," neither can it rest on a mere assumption or intuition that the excused jurors would be biased in favor of a defendant of their own race; nor is it sufficient simply to deny an illicit motive or make an affirmation of good faith.[14] Instead, a prosecutor "must articulate a neutral explanation related to the particular case to be tried."[15] Finally, the court must decide whether "the defendant has established purposeful discrimination."[16]

Sumpter v. State[17] involved a black defendant found guilty on two counts of possession with intent to distribute cocaine and heroin. In selecting the jury,

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8. *Id.* at ___, 442 S.E.2d at 626.

9. 476 U.S. 79 (1986).

10. The Equal Protection clause states: ". . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

11. *See Batson*, 476 U.S. at 98.

12. *See id.* at 94-96 nn.18-19.

13. *Id.* at 96 (citations omitted).

14. *Id.* at 97.

15. *Id.* at 98 (footnote omitted).

16. *Batson*, 476 U.S. at 98. The holding in *Batson* was limited to the exercise of race-based strikes of prospective black jurors by a prosecutor in a criminal action against a black defendant. However, the Court has gradually extended the rule to cover other situations. *See* Georgia v. McCollum, 112 S. Ct. 2348 (1992) (criminal defendants); Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991) (both parties in civil trials); Powers v. Ohio, 499 U.S. 400 (1991) (the striking of black jurors when the defendant is white). Recently, the *Batson* rationale was further extended to prohibit the use of peremptory strikes based on gender. J.E.B. v. Alabama *ex. rel* T.B., 114 S. Ct. 1419 (1994).

17. ___ S.C. ___, 439 S.E.2d 842 (1994).

the prosecutor used two peremptory strikes, each time removing a black male from the panel.[18] In response to defense counsel's *Batson* motion, the solicitor explained that one juror was struck for two reasons: because he was young, and because the solicitor had struck him earlier in the week.[19] The second juror, according to the solicitor, was struck because he had "a prior DUI involvement," and the prosecutor who had handled the earlier case "felt as though he might not be a fair and reasonable juror."[20]

In considering the validity of these explanations, the court noted that the burden is on the party making the *Batson* motion to prove that the allegedly neutral reason for striking a juror is pretextual because it has not been applied in a neutral manner.[21] As to the first juror, the court did not discuss the defendant's argument that an explanation for a strike that rests on a previous unexplained strike merely begs the question.[22] Rather, the court summarily found this explanation to be racially neutral. Furthermore, because the record did not disclose precisely how old the struck juror was, the court refused to consider the argument that the explanation based on age was pretextual.[23]

Defendant Sumpter next argued that the different treatment of the black juror with a DUI "involvement," whom the State struck, and the white juror with an actual DUI conviction, whom the State did not strike, revealed that the solicitor's explanation was nothing more than a pretext for excluding the juror because he was black.[24] The court, however, focused on the fact that, while the struck juror's DUI "involvement" had been with the solicitor's office that was prosecuting Sumpter, nothing in the record indicated that the seated, white juror had been prosecuted by that same solicitor's office.[25] The court's rationale for drawing such a distinction rested, in part, on the United States Supreme Court's statement in *Hernandez v. New York*[26] that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[27] In addition, "great deference" should

18. *Id.* at ___, 439 S.E.2d at 843.

19. *Id.* at ___, 439 S.E.2d at 843.

20. *Id.* at ___, 439 S.E.2d at 844. In *State v. Oglesby* the South Carolina Supreme Court approved as a racially neutral reason for exercising a peremptory challenge the solicitor's explanation that the juror had a DUI conviction. 298 S.C. 279, 379 S.E.2d 891 (1989). In *Sumpter* it is unclear from the record whether the solicitor used the term "involvement" as a euphemism for "charge," or "conviction," or for something else altogether.

21. *Sumpter*, ___S.C. at ___, ___, 439 S.E.2d at 843, 844 (citing State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)).

22. *See* Brief of Appellant at 7.

23. *Sumpter*, ___ S.C. at ___, 439 S.E.2d at 843-44.

24. Brief of Appellant at 8.

25. *Sumpter*, ___ S.C. at ___, 439 S.E.2d at 844 ("No evidence was presented that the white juror who was seated had the same disqualification as [the stricken juror], i.e. a DUI involvement which was handled by this particular solicitor's office.").

26. 500 U.S. 352 (1991).

27. *Id.* at 360; State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991) (citing *Hernandez*, 500

be accorded to the trial court's "findings regarding purposeful discrimination" because they depend largely on an "evaluation of demeanor and credibility."[28]

Justice Toal, joined by Justice Finney, dissented, arguing that a defendant need not "show anything more than the seating of a white juror when the same reason was used to excuse a black juror."[29] In her view, the solicitor's reliance on the recommendation of his colleague, who thought the juror with prior DUI involvement would not be "fair and reasonable," was "meaningless" because nothing was offered to "distinguish the excused black juror with DUI involvement from the seated white juror with a DUI conviction."[30]

By justifying its decision on the basis of an incomplete record, the court imposed upon Sumpter's defense counsel the responsibility of responding to the solicitor's justifications for the strike and ensuring that the record specifically reflects why the trial court should have rejected the proffered explanations. Because the record contained an insufficient rebuttal to the prosecutor's explanations, the trial court's finding of no *Batson* violation was affirmed.[31]

Foster v. Spartanburg Hospital System[32] involved a wrongful death action by Virginia Foster, a black woman. During jury selection, the defense used all of its allotted peremptory strikes to remove four of the five blacks from the panel.[33] Pursuant to plaintiff's motion, the trial court called on defense counsel to provide race-neutral reasons for each of the strikes, after which the court found that there had been no purposeful discrimination.[34] The jury later returned a verdict for the defendant, and Foster appealed.

In its unanimous opinion, the appeals court focused primarily on the reasons given by the hospital for striking two of the four excused jurors.[35]

U.S. 360), *cert. denied*, 503 U.S. 962 (1992).

28. *Sumpter*, ___ S.C. at ___, 439 S.E.2d at 844 (citing *Hernandez*, 500 U.S. 352 and *Green*, 306 S.C. at 98, 409 S.E.2d at 787).

29. *Id.* at ___, 439 S.E.2d at 845 (Toal, J., dissenting).

30. *Id.* at ___, 439 S.E.2d at 845.

31. *Id.* at ___, 439 S.E.2d at 844.

32. ___ S.C. ___, 442 S.E.2d 624 (Ct. App. 1994).

33. *Id.* at ___, 442 S.E.2d at 626.

34. Record at 28.

35. The court did not consider the validity of defense counsel's explanation for the striking of two other black males. As to the first, defendant's counsel claimed to have stricken a black male because he was a single male, 20 years of age, and might be likely to identify with the decedent's son, whom counsel described as "a really clean-cut young guy who is working his way through school as a student at the University of South Carolina," and who would testify for the plaintiff. *Id.* at 29-30. Counsel also explained that he removed a black male who reported suffering from a back injury for which he filed a Workers' Compensation claim. In addition, according to the defendant's business records, the juror had an unpaid bill at the defendant hospital. *Id.* at 28-29.

The defendant offered three reasons for removing one thirty-five year old man. First, in response to a question on the juror questionnaire about membership in various types of organizations, he answered that, among other organizations, he was a "member of the Democratic Party."[36] Second, responding to another question, he wrote that he was "a loyal American citizen, [who has] never been in any trouble with the law."[37] Lastly, he reported a family history of heart trouble, allergies, and high blood pressure.[38]

The defense claimed to have removed a thirty year old black woman for two reasons. First, she was the only young female juror whose mother suffered from high blood pressure, a condition which also plagued the plaintiff's decedent.[39] Second, according to the defense, she was the only juror who failed to answer the question on the juror questionnaire asking, "Do you feel that you could fairly decide a lawsuit involving a hospital and an individual?"[40]

Unlike the supreme court's approach in *Sumpter v. State*, which showed great deference to the determination of the trial court,[41] the court of appeals directly considered the validity of the proffered explanations. The court found that the defendant's explanations were not "reasonable" and therefore rejected both. While *Batson* requires that the reasons for striking a juror be race-neutral,[42] the South Carolina Supreme Court has added to *Batson*, requiring that an explanation must also be "(2) related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate."[43] The court later held that "[a]ny such explanation must rest on a reasonable basis and not on the solicitor's bare assertion or mere speculation."[44]

Addressing the struck male juror's declaration of party loyalty, the court rebuffed the respondent's suggestion that a "Democrat is more inclined than a Republican or some other party affiliate to favor 'the little person.' Such a

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36. *Foster*, ___ S.C. at ___, 442 S.E.2d at 626.

37. *Id.* at ___, 442 S.E.2d at 626.

38. *Id.* at ___, 442 S.E.2d at 626.

39. *Id.* at ___, 442 S.E.2d at 626.

40. *Id.* at ___, 442 S.E.2d at 626; *see also* Record at 223.

41. *See supra* note 28 and accompanying text.

42. In *Hernandez v. New York* the Supreme Court defined a race-neutral explanation as "an explanation based on something other than the race of the juror." 500 U.S. 352, 360 (1991).

43. State v. Tomlin, 299 S.C. 294, 298, 384 S.E.2d 707, 709 (1989).

44. State v. Grandy, 306 S.C. 224, 227, 411 S.E.2d 207, 208 (1991). Interestingly, the United States Supreme Court has never held that peremptory strikes may not rest on sweeping generalizations, but only that such generalization may not reflect racial or gender stereotypes. *See* J.E.B. v. Alabama *ex. rel* T.B., 114 S. Ct. 1419 (1994); Batson v. Kentucky, 476 U.S. 79 (1986). Furthermore the Supreme Court has specifically stated that the explanation "need not rise to the level justifying excercise of a challenge for cause." *Batson*, 476 U.S. at 97; *accord Tomlin*, 299 S.C. at 298, 384 S.E.2d at 709.

sweeping generalization about members of an entire political party is not a reasonable, race neutral explanation, but is mere speculation."[45]

Although the court of appeals was still in the second phase of the *Batson* analysis, examining the neutrality of the proffered explanations, the court seemingly looked ahead to the third phase of the analysis and found the explanations to be pretextual. One way a movant may show that a proffered, race-neutral explanation is pretextual is to demonstrate that it has not been applied even-handedly.[46] Applying this standard to the defendant's explanation for striking the black male juror, the court stated that it could see no real distinction between the excluded juror's declaration of loyalty as an American citizen and a response to the same question by a seated white juror who said she was "a law abiding citizen."[47] The court held that the hospital had "negated" this second reason for disqualification because it was not applied even-handedly.

The court was similarly skeptical of the defendant's explanation that it struck both jurors because of their family medical histories. The court observed that a number of seated, white jurors either themselves suffered, or had family members who suffered, from ailments like those reported by the excluded male juror.[48] As to the female juror, the court refused to accept as significant that she was the only young woman whose mother had high blood pressure. Counsel argued that this fact raised concerns about her being disposed to sympathize with the female plaintiff, whose mother had also suffered from high blood pressure.[49] To the court, this precise confluence of similarities was insufficient to distinguish the excluded female from those white jurors—at least one of whom was a female—whose family members also suffered from a heart condition or high blood pressure.[50]

Finally, addressing the defense's argument that the female venireperson was struck because she failed to answer a question on the juror questionnaire, the court noted that at least two white jurors were seated who also had failed to complete the questionnaire fully. The court pointed out that, in any event, all the jurors were orally questioned by the trial judge as to whether they "knew any reason they could not give a fair trial to both parties," and the

45. *Foster*, ___ S.C. at ___, 442 S.E.2d at 626 (citing State v. Grandy, 306 S.C. 224, 227, 411 S.E.2d 207, 208 (1991)). In *Grandy* the court rejected a prosecutor's explanation that he struck a black juror simply because he wanted to seat other venire persons not yet presented, and said that "[a]ny such explanation must rest on a reasonable basis and not on the solicitor's bare assertion or mere speculation." *Grandy*, 306 S.C. at 227, 411 S.E.2d at 208.

46. State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989).

47. *Foster*, ___ S.C. at ___, 442 S.E.2d at 626.

48. *Id.* at ___, 442 S.E.2d at 626.

49. *See id.* at ___, 442 S.E.2d at 626.

50. *See id.* at ___, 442 S.E.2d at 626.

struck female did not affirmatively respond.[51] The court reversed and remanded for a new trial.[52]

Both the supreme court and the court of appeals followed the *Baston* methodology. In *Foster* the court of appeals focused on whether (1) political party affiliation and (2) family medical history are "reasonable, race-neutral" justifications for striking members of the jury venire. In *Sumpter*, having found the proffered explanations to be "reasonable and race-neutral," the supreme court focused primarily on the third prong of *Batson*: whether the movant met its burden in showing that the proffered explanations were merely pretextual.

The holdings of these cases offer three signals to practitioners involved in *Batson* disputes. First, *Foster* suggests that explanations for striking jurors must be both race-neutral and reasonable in order to shift the burden back to the movant to show pretext. Second, the court of appeals has indicated a willingness to look ahead to the even-handedness of the application of the explanations to determine whether they are valid. Finally, *Sumpter* makes clear that movants must ensure that the trial record is complete and clearly reflects all the circumstances that give rise to an inference of racial discrimination.

C. Shawn Dryer

III. COURT REJECTS LIBERAL INTERPRETATION OF RULE 59(b)

In *Boone v. Goodwin*[1] the South Carolina Supreme Court overruled the court of appeals' interpretation of Rule 59(b) of the South Carolina Rules of Civil Procedure. Rule 59(b) states that in jury cases "[t]he motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter."[2] The supreme court interpreted the rule as requiring a party to "make a motion for a new trial promptly after the jury is discharged or *request* ten days within which to make the motion."[3]

The jury in *Boone* returned a verdict for Goodwin, the appellant. After the jury was discharged, the respondent clearly indicated that he had no post-trial motions.[4] The respondent filed a motion for a new trial or judgment *non*

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51. *Id.* at ___, 442 S.E.2d at 626.
52. *Foster*, ___ S.C. at ___, 442 S.E.2d at 627.

1. ___ S.C. ___, 444 S.E.2d 524 (1994).
2. S.C. R. CIV. P. 59(b).
3. *Boone*, ___ S.C. at ___, 444 S.E.2d at 525 (emphasis added).
4. After polling and excusing the jury, the court engaged in the following colloquy with respondent's counsel:
The Court: All right . . . anything?

obstante veredicto (JNOV) two days later.[5] The trial court granted the respondent's motion for a new trial.[6]

During post-trial arguments, the appellant contended that the respondent's motion for a new trial was untimely. Despite its awareness of persuasive authority supporting the appellant's position,[7] the court found it had discretion to grant the motion. In so holding, the trial judge determined that the presence of the disjunctive "or" in Rule 59(b) showed the drafters' intent to give the court the authority to grant the motion for a new trial within ten days.[8]

On appeal, the South Carolina Supreme Court reversed the trial court's order granting a new trial.[9] The court held that the respondent's motion for a new trial was untimely because it was not made promptly after the jury was discharged.[10] The court stated that if one is not ready to make a motion promptly after the jury is discharged, one must request ten days within which to make the motion.[11] Under this interpretation, a court may only use its discretion to determine, at the close of the trial, if a ten day extension for post-trial motions is warranted.

The supreme court based its decision on two principal sources. First, the court recognized Lightsey and Flanagan's interpretation of Rule 59(b).[12] Lightsey and Flanagan state that "[c]ounsel must move for a new trial promptly after the return of the verdict, or request ten days within which to make the motion."[13] Second, the court relied on the Reporter's Note to Rule

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Counsel: Nothing further, your honor.
The Court: No motions?
Counsel: No motions.
Record at 14.

5. *Id.* at 4.

6. *Id.* at 1.

7. The trial judge recognized that the appellant's position was supported by "a very large body of opinion," including that of Harry M. Lightsey, Jr., former Dean of the University of South Carolina School of Law and co-author of the South Carolina Bar publication on South Carolina Civil Procedure. Referring to Lightsey, the judge stated, "that's some pretty strong weight." *Id.* at 19.

8. *Id.* at 19.

9. *Boone*, ___ S.C. at ___, 444 S.E.2d at 525.

10. *Id.* at ___, 444 S.E.2d at 525.

11. *Id.* at ___, 444 S.E.2d at 525. The Court noted that Rules 59(b) and 50(e), which concerns motions for JNOV, have the same language and a substantially similar accompanying reporter's note. *Id.* at ___ nn.1-2, 444 S.E.2d at 525 nn.1-2.

12. *Id.* at ___, 444 S.E.2d at 525 (citing HARRY M. LIGHTSEY, JR. & JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 389 (2d. ed. 1976)).

13. LIGHTSEY & FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 389 (1985) (comparing counsel's motion for a new trial with a trial court granting of a new trial on its own motion). Under Rule 59(d), the court, on its own initiative, may order a new trial for any reason for which it might have granted a new trial on motion of a party. This order must be made no later than

59, which states: "In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them."[14] Relying on these two sources, the court quickly concluded that the respondent's motion was not timely.

The South Carolina Court of Appeals previously advanced a contrary interpretation of the rule. In *Buxton v. Thompson Dental Company*[15] the court of appeals, like the trial judge in *Boone*, interpreted Rule 59(b) to give a court discretion to allow a motion for a new trial anytime during the ten day period following entry of judgment.[16] The court of appeals reasoned that if the motion were made promptly after the jury was dismissed, the mover would have an unconditional right to have the motion heard, but that if this were not done, a court could exercise discretion to hear the motion within ten days.[17]

The court of appeals' opinion makes no mention of the sources that the supreme court relied on in *Boone*. Rather, the court of appeals invoked the general premise that "rules of civil procedure are to be construed to secure 'the just, speedy, and inexpensive determination of every action'."[18] The court also reiterated with approval the trial judge's statement that "procedural difficulties sometimes do not result in justice."[19] Despite an apparent desire to harmonize its interpretation of Rule 59(b) with the more general dictates of Rule 1, the court of appeals was also careful to warn that "counsel should be careful to comply with Rule 59(b) and not interpret this opinion as an open invitation to ignore its dictates."[20]

The supreme court's decision in *Boone* is consistent with the history of Rule 59. The present South Carolina Rules of Civil Procedure are based largely on the Federal Rules, but it was sometimes necessary for the drafters of the South Carolina rules to tailor the Federal Rules to state practice. The South Carolina drafters specifically rejected federal Rule 59(b), which allowed post-trial motions to be made not later than ten days after entry of judgement.[21] Former South Carolina practice was also rejected as ambiguous and

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ten days after entry of judgment. S.C. R. CIV. P. 59(d).

14. S.C. R. CIV. P. 59(b) note.

15. 307 S.C. 523, 415 S.E.2d 844 (Ct. App. 1992), *overruled by* Boone v. Goodwin, ___ S.C. ___, 444 S.E.2d 524 (1994).

16. *Id.* at 527, 415 S.E.2d at 847 (citing 58 AM. JUR. 2D *New Trial* § 475 (1989)).

17. *Id.* (stating that the court would consider the timing and reasons for delay in determining whether a motion for a new trial should be granted).

18. *Id.* (quoting S.C. R. CIV. P. 1).

19. *Id.* The court of appeals' more liberal interpretation of Rule 59(b) may have been motivated to some extent by the specific facts and circumstances before the court. Unlike the situation in *Boone*, the party receiving the adverse judgment in *Buxton* moved for a new trial only hours later on the same day. *Id.* at 525, 415 S.E.2d at 846.

20. *Buxton*, 307 S.C. at 527, 415 S.E.2d at 847.

21. LIGHTSEY & FLANAGAN, *supra* note 13, at 392. The drafters apparently viewed the federal model as unsuitable because of the nature of judicial rotation and the fact that many post-

"a trap for the unwary."[22] It is therefore clear that the new rule was intended to duplicate neither the federal rule nor former South Carolina practice. By requiring a party to "make a motion for a new trial promptly after the jury is discharged or request ten days within which to make the motion,"[23] the South Carolina Supreme Court has provided a definitive interpretation of Rule 59(b) and clarified an important area of state civil procedure.

L. Gregory C. Horton

IV. COURT REVIVES COMMON-LAW BILL OF DISCOVERY

In *Wofford v. Ethyl Corporation*[1] the South Carolina Supreme Court addressed the issue of discovery from nonparties and revived the common-law bill of discovery.[2] The court determined that apart from the South Carolina Rules of Civil Procedure, courts maintain equitable jurisdiction to entertain independent suits of discovery when the rules do not provide an adequate mechanism.[3] Noting that South Carolina Rule of Civil Procedure 34(c) authorizes independent discovery against a nonparty, the court held that a bill of discovery may be granted despite the absence of a present lawsuit to which the requested discovery is relevant.[4]

In *Wofford* an employee of Ethyl Corporation (Ethyl) suffered a fatal injury while working at Ethyl's plant. After Ethyl paid the required workers' compensation benefits, the administrator of the decedent's estate, Wofford, sought permission from Ethyl to inspect its plant to determine whether a claim existed against a third party.[5] Ethyl refused the request and Wofford filed an action to compel the employer to allow the inspection. The trial court granted Wofford's request for discovery and Ethyl appealed.[6]

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trial motions could be raised and resolved shortly after the verdict. *Id.*

22. *Id.* at 391-92. Former Circuit Court Rule 79 and S.C. CODE ANN. §§ 15-33-110 and 15-33-120 (Law Co-op. 1976) required counsel to make motions for JNOV and for a new trial after the reception of the verdict and before the trial court's adjournment.

23. *Boone*, ___ S.C. at ___, 444 S.E.2d at 525.

1. ___ S.C. ___, 447 S.E.2d 187 (1994).

2. *Id.* at ___, 447 S.E.2d at 189.

3. *Id.* at ___, 447 S.E.2d at 189.

4. *Id.* at ___, 447 S.E.2d at 189.

5. *Id.* at ___, 447 S.E.2d at 188. Due to the exclusive remedy provisions of the South Carolina Workers' Compensation Act, Ethyl could not be a defendant in future litigation. *See* S.C. CODE ANN. § 42-1-540 (Law. Co-op. 1976).

6. *Wofford*, ___ S.C. at ___, 447 S.E.2d at 188.

Ethyl asserted that because Rule 34 does not specifically authorize a prelawsuit discovery action against a nonparty, the requested inspection could not be granted.[7] The court disagreed, noting that subdivision (c) expressly provides that the rule does not foreclose an independent action for discovery against a nonparty.[8]

South Carolina Rule of Civil Procedure 34 was patterned after its federal counterpart, which prior to 1970 did not contain subdivision (c).[9] Before the 1970 addition of subdivision (c), several courts refused to entertain independent actions for discovery against nonparties, believing the Rules to be preemptive.[10] In fact, prior to this addition the federal rules contained a "curious gap"[11] affecting discovery from nonparties. For example, Federal Rule 34(a) provided for the production of items and entry upon land for inspection, but by its express terms applied only to parties.[12] A Rule 45 subpoena allowed the inspection of some nonparty items, but only those items which the nonparty could transport to the deposition.[13] If the item to be inspected was too large and remained on the nonparty premises, as in *Wofford*, no rule authorized entry onto the land, and a party seeking discovery could not obtain it due to this gap in the discovery rules.[14]

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7. *Id.* at ___, 447 S.E.2d at 188.

8. *Id.* at ___, 447 S.E.2d at 189. Rule 34(c) states, "This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land." S.C. R. CIV. P. 34(c).

9. *See* FED. R. CIV. P. 34(c) (amended 1991).

10. *See* 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2209 (1994); Note, *Rule 34(c) and Discovery of Nonparty Land*, 85 YALE L.J. 112, 114 (1975). The federal rules advisory committee noted:

> Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive.

FED. R. CIV. P. 34 advisory committee's note.

11. Note, *supra* note 10, at 112.

12. *See* FED. R. CIV. P. 34; S.C. R. CIV. P. 34.

13. *See* FED. R. CIV. P. 45(d)(1) (amended 1991); S.C. R. CIV. P. 45 (amended 1993). In 1991 and in 1993, both the federal rules and the South Carolina rules were amended to allow a subpoena permitting the inspection of the premises of a nonparty. FED. R. CIV. P. 45(a)(1)(C); S.C. R. CIV. P. 45(a)(1)(C). South Carolina Rule 34(c) was also amended to reflect this change and now reads:

> A person not a party may be compelled to produce documents or things or submit to an inspection only as provided in Rule 45. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

S.C. R. CIV. P. 34(c).

14. *See* 8 WRIGHT & MILLER, *supra* note 10, § 2209 (1994); Note, *supra* note 10, at 112.

Although the 1970 amendment to Rule 34 at issue in *Wofford* did not expressly authorize entry onto land of a nonparty, it clearly provided that the rules of civil procedure are not preemptive and do not foreclose the possibility of an independent action for discovery.[15] Accordingly, the exclusion of any express authorization for inspection of the property of nonparties does not foreclose such an action.[16]

Whether and under what circumstances an independent action may be brought depends upon each jurisdiction's treatment of the equitable bill of discovery. Relying on *Shorey v. Lincoln Pulp & Paper Co.*[17] and *Ex parte Goodyear Tire and Rubber Co.*,[18] the South Carolina Supreme Court determined that modern discovery rules have not destroyed the court's traditional equitable jurisdiction in South Carolina.[19] While the existence of modern rules has nearly eliminated the need for an independent action, courts may still use their equitable power to grant a bill of discovery "when effective discovery cannot otherwise be obtained and the ends of justice served."[20] In this case, Wofford's only alternative was to seek an equitable bill of discovery because no other discovery procedure would authorize entry onto a nonparty's land. Without the requested discovery, Wofford could not determine whether a claim against another party existed. The court thus upheld the trial judge's grant of the desired discovery.[21]

The court further held that a trial court may grant a bill of discovery even though no civil action yet exists.[22] At common law the bill was most often used to aid a party in an action already pending, but the court ruled that the pendency of such action was not necessary.[23] Because discovery may be

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15. *See* FED. R. CIV. P. 34 advisory committee's note (explaining that jurisdictional and procedural problems prevented the direct authorization by Rule 34 of discovery against nonparties); *see also* Wimes v. Eaton Corp., 573 F. Supp. 331, 334-37 (E.D. Wisc. 1983); Huynh v. Werke, 90 F.R.D. 447, 450 (S.D. Ohio 1981) (explaining that "while Rule 34(c) does not explicitly authorize independent discovery actions against nonparties, neither does it prohibit them"); Folsom v. Western Elec. Co., 85 F.R.D. 651, 652-53 (W.D. Okla. 1980) (pointing out that Rule 34(c) does not preclude an independent action against a nonparty).

16. *See* HARRY M. LIGHTSEY & JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 326 (1985). "Rule 34(c) was added to make clear that the Rule was not the exclusive means of compelling the production and inspection of documents and entry onto land. It [the rule] does not specify any of the procedures to be used in the special proceedings which are left to prior case law." *Id.*

17. 511 A.2d 1076, 1078 (Me. 1986).

18. 248 S.C. 412, 150 S.E.2d 525 (1966).

19. *Wofford*, ___ S.C. at ___, 447 S.E.2d at 189.

20. *Id.* at ___, 447 S.E.2d at 189 (citing *Shorey*, 511 A.2d at 1078).

21. *Id.* at ___, 447 S.E.2d at 189.

22. *Id.* at ___, 447 S.E.2d at 189.

23. *Id.* at ___, 447 S.E.2d at 189 (citing *Shorey*, 511 A.2d at 1078).

necessary to determine the appropriate parties, proof of the existence of a valid claim and proof that a suit is about to commence is sufficient.[24]

The court's ruling in *Wofford* that statutes and modern discovery rules have not displaced the equitable jurisdiction of the court to entertain independent suits of discovery has much support in other jurisdictions.[25] However, some have argued that the modern policy of creating simpler, more uniform, and more efficient procedures calls for a disposal of the cumbersome bill.[26] Finding this argument persuasive, some jurisdictions have rendered the bill obsolete.[27]

The court relied upon *Ex parte Goodyear Tire & Rubber Co.*[28] in concluding that courts may grant a bill in equity when the rules do not provide adequate relief.[29] In that case, defendant Goodyear sought to examine an allegedly defective tire that was the subject of litigation and in the possession of an adversary.[30] The discovery statutes then in existence did not allow such discovery. Nevertheless, the court determined that the trial court had the inherent equitable authority to order discovery beyond that which was then authorized by statute.[31] Because, however, the issue before the court in *Goodyear* was limited to allowing discovery against an adverse party in a pending action at law,[32] Ethyl argued, unsuccessfully, that *Goodyear* should not be controlling.[33]

The traditional bill in equity was ordinarily used by parties in a pending action at law. Without the bill, the adversary could not be compelled to relinquish items that could be used by the opponent.[34] In fact, some authority

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24. *Wofford*, ___ S.C. at ___, 447 S.E.2d at 189 (quoting JOHN N. POMEROY, EQUITY JURISPRUDENCE § 197(b) (1941)).

25. *See, e.g.*, Berger v. Cuomo, 644 A.2d 333, 337 (Conn. 1994) ("[T]he bill [of discovery] is within the inherent power of a court of equity . . . [and] has been a procedural tool in use for centuries. The bill is well recognized and may be entertained notwithstanding the statutes and rules of court relative to discovery.") (citations omitted); Adventist Health System/Sunbelt, Inc. v. Hegwood, 569 So. 2d 1295, 1296-97 (Fla. Dist. Ct. App. 1990) (en banc) ("Statutes designed to supersede or modify rights provided by common law must be strictly construed and will not displace common law remedies unless such an intent is expressly declared.") (citations omitted).

26. *E.g.*, Wimes v. Eaton Corp., 573 F. Supp. 331, 336 (E.D. Wisc. 1983); Home Ins. Co. v. First Nat'l Bank of Rome, 89 F.R.D. 485, 488-89 (N.D. Ga. 1980); Note, *supra* note 10, at 119.

27. *See* Rothery Storage and Van Co. v. Atlas Van Lines, Inc., 609 F. Supp. 554, 556 (N.D. Ill. 1985) (mem.); Guertin v. Guertin, 561 N.E.2d 1339, 1342 (Ill. App. Ct. 1990). In *Guertin* the Illinois Court Rules specifically provide for the type of discovery desired in *Wofford* even though the court ruled that the equitable bill was obsolete in Illinois. *See id.*, 561 N.E.2d at 1342.

28. 248 S.C. 412, 150 S.E.2d 525 (1966).

29. *Wofford*, ___ S.C. at ___, 447 S.E.2d at 189.

30. *Ex parte* Goodyear Tire & Rubber Co., 248 S.C. at 415, 150 S.E.2d at 526.

31. *Id.* at 421, 150 S.E.2d at 529.

32. *Id.* at 417-21, 150 S.E.2d at 527-29.

33. Amended Final Brief of Appellant at 8-10.

34. *See* Shutes v. Fowler, 584 N.E.2d 920, 922 (Ill. App. Ct. 1991); Shorey v. Lincoln Pulp

suggests that the bill was never intended to apply to those who are not parties to a lawsuit.[35] When, however, the traditional bill did not provide the desired discovery, courts began to broaden its application to fit the needs of parties seeking discovery.[36] A large number of courts have extended the bill to provide for discovery from nonparties.[37] Similarly, many courts have eliminated the requirement of a pending lawsuit.[38]

Consistent with the nature of equity jurisprudence, the *Wofford* court did not specify under what circumstances a bill should be granted and the extent of the discovery, except that the trial judge should issue "appropriate orders . . . when effective discovery cannot otherwise be obtained and the ends of justice served."[39] In most instances, whether and to what extent discovery is allowed is left to the discretion of the trial judge, who is in the best position to determine the necessity of the information in relation to the burden on the defendant.[40] In any case, the bill should not be viewed as an open invitation to delve into the affairs of another.[41]

When the South Carolina Rules of Civil Procedure failed to provide a mechanism for discovery, the *Wofford* court granted an independent bill of discovery, allowing inspection of the premises of a nonparty despite the lack of a pending lawsuit to which the discovery was relevant. Even though South Carolina's bill was previously limited to use against adverse parties while an action at law was pending, the court's extension of the bill to fit the circumstances presented in *Wofford* was appropriate because, without such discovery,

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& Paper Co., 511 A.2d 1076, 1077-78 (Me. 1986).

35. *See* Arcell v. Ashland Chem. Co., 378 A.2d 53, 71 (N.J. Super. Ct. Law Div. 1977) (citing 6 WIGMORE, EVIDENCE § 1856(d) (1976)).

36. *See* Note, *supra* note 10, at 116.

37. *E.g.*, Lubrin v. Hess Oil Virgin Islands Corp., 109 F.R.D. 403, 404-05 (D.V.I. 1986); Pottetti v. Clifford, 150 A.2d 207, 212 (Conn. 1959); Shorey v. Lincoln Pulp & Paper Co., 511 A.2d 1076, 1078 (Me. 1986); Robbins v. Kalwall Corp., 417 A.2d 4, 5 (N.H. 1980) (per curiam).

38. *E.g.*, Adventist Health System/Sunbelt, Inc. v. Hegwood, 569 So. 2d 1295, 1297 (Fla. Dist. Ct. App. 1990) (en banc); Temple v. Chevron U.S.A. Inc., 840 P.2d 561, 565 (Mont. 1992).

39. *Wofford*, ___ S.C. at ___, 447 S.E.2d at 189 (citing *Shorey*, 511 A.2d at 1078).

40. *See* Snyder v. Queen Cutlery Co., 516 A.2d 71, 74 (Pa. Sup. Ct. 1986) ("[T]he lower court is in a better position to weigh the equities of the situation . . . ."). Several factors that might be considered in making those determinations include: (1) the interest of the proposed deponent from whom discovery is sought in the outcome of the litigation; (2) the necessity or importance of the information sought; (3) the ease of supplying the information; (4) the significance of the rights or interest the nonparty seeks to protect; and (5) whether a less burdensome means to accomplish the objective exists. *See* Berrie v. Berrie, 457 A.2d 76, 81 (N.J. Super. Ct. Ch. Div. 1983).

41. *See* Rothery Storage and Van Co. v. Atlas Van Lines, Inc., 609 F. Supp. 554, 556 (N.D. Ill. 1985) (mem.); Temple v. Chevron U.S.A. Inc., 840 P.2d 561, 566 (Mont. 1992).

the plaintiff would have been precluded from ascertaining whether a claim existed.

Nancy Johnson Mullis

V. COURT HOLDS THAT SOVEREIGN IMMUNITY IS NOT A JURISDICTIONAL BAR

In *Washington v. Whitaker*[1] the South Carolina Supreme Court held that sovereign immunity is an affirmative defense that a party must plead in order to avoid its waiver.[2] Specifically, the court held that a municipality waived its objection to the propriety of punitive damages assessed pursuant to an action brought under 42 U.S.C. § 1983[3] by failing to object until the municipality made a motion for judgment *non obstante veredicto* (JNOV). In so holding, the court overruled the long-standing rule that sovereign immunity is a jurisdictional bar that cannot be waived.

On February 16, 1989, Charleston police conducted a drug raid pursuant to a warrant issued upon an officer's affidavit that he observed a confidential informant enter a dwelling at 37H Flood Street on two separate occasions to purchase cocaine from a suspect named "Dean." When police executed the warrant, they knocked on the door to 37H Flood Street and asked for Dean. Josephine Washington, the resident of 37H Flood Street, informed police that Dean lived next door. Nevertheless, police entered the dwelling and, after finding no evidence of illegal drugs on the premises, performed strip searches on Ms. Washington, her daughter, and her granddaughter. Police found no illegal drugs.[4] The apartment residents subsequently brought a state court action[5] against the City of Charleston and the police officers in charge of the search, alleging Fourth Amendment violations under § 1983 and the South Carolina Tort Claims Act.[6]

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1. ____ S.C. ____, 451 S.E.2d 894 (1994).

2. *Id.* at ___, 451 S.E.2d at 898.

3. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983 (1994).

4. *Washington*, ___ S.C. at ___, 451 S.E.2d at 896.

5. State and federal courts enjoy concurrent jurisdiction over private causes of action brought pursuant to § 1983. *See* Allen v. McCurry, 449 U.S. 90, 99-101 (1980) (citing Monroe v. Pape, 365 U.S. 167 (1961)).

6. *Washington*, ___ S.C. at ___, 451 S.E.2d at 897; *see* S.C. CODE ANN. §§ 15-78-10 to

At trial, the City made a motion to strike punitive damages from the complaint on the § 1983 action because of insufficient evidence. The motion was denied. The City then submitted its proposed punitive damages charge.[7] After the jury returned a verdict for the plaintiffs, awarding both actual and punitive damages under § 1983,[8] the City moved for a JNOV based upon the United States Supreme Court's decision in *City of Newport v. Fact Concerts, Inc.*[9] The trial judge ruled that the City waived its right to object to the propriety of punitive damages by submitting its own suggested punitive damages charge and by failing to object to the charge or verdict form pursuant to Rule 51 of the South Carolina Rules of Civil Procedure.[10] The City appealed, assigning as error the trial judge's failure to strike the punitive damages from the § 1983 action pursuant to *City of Newport*.[11]

The court held that the City waived any possible objection to punitive damages on procedural grounds. Although the court apparently recognized *City of Newport* as controlling, it nevertheless determined that the plain meaning of Rule 51 precluded the City from raising the issue on appeal.[12] Unlike federal courts, South Carolina courts do not recognize a plain error rule exception to Rule 51, which would have given the court grounds to hear the issue on appeal.[13] Instead, in South Carolina courts, "a contemporaneous

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-190 (Law. Co-op. Supp. 1994).

7. *Washington*, ___ S.C. at ___, 451 S.E.2d at 898.

8. If a search is determined to be unreasonable under the Fourth Amendment, punitive damages are proper. *See* Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.) (per curiam), *cert. denied*, 393 U.S. 940 (1968).

9. 453 U.S. 247 (1981). In *City of Newport* the Court held that a municipality cannot be held liable for punitive damages under § 1983. *Id.* at 271.

10. Rule 51 of the South Carolina Rules of Civil Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.* Opportunity shall be given to make the objection out of the hearing of the jury.

S.C. R. Civ. P. 51 (emphasis added).

11. *Washington*, ___ S.C. at ___, 451 S.E.2d at 898. The court considered a number of other issues on appeal. Specifically, the defendant police officer maintained that he was entitled to the defense of qualified immunity. Both parties argued that they were entitled to a directed verdict on the § 1983 action, that a juror should have been disqualified, that evidence concerning drug activity in the neighborhood should have been admissible, that both parties were entitled to a mistrial, that a magistrate had been improperly questioned, and that their request to charge the jury that a search performed pursuant to a valid warrant is presumed to be valid and reasonable was improperly refused. *Id.* at ___, 451 S.E.2d at 897.

12. *Id.* at ___, 451 S.E.2d at 898.

13. The plain error rule provides that errors which affect substantial rights may be considered

objection must be made to preserve an argument for appellate review."[14] In so holding, the court expressly overruled "the antiquated rule that sovereign immunity is a jurisdictional bar and, accordingly, cannot be waived."[15] Now, under South Carolina law, sovereign immunity is an affirmative defense that a party must plead in order to prevent waiver.[16]

On its face, Rule 51 of the South Carolina Rules of Civil Procedure seems to deal effectively with the waiver issue that was before the court. Because the City failed to make an objection to the jury charge until after a verdict was returned, any subsequent objection would be procedurally barred. In order to reach that result, the court merely needed to determine that sovereign immunity was a defense capable of being waived. The court accomplished this by simply stating that sovereign immunity was no longer a jurisdictional bar.[17]

Justice Littlejohn dissented, noting that the majority's ruling created the anomalous result of allowing the plaintiffs to recover punitive damages against the City when "the General Assembly has said that such are not recoverable under [the] South Carolina Tort Claims Act and the United States Supreme Court has said that punitive damages are not recoverable under a 1983 claim."[18] In *McCall v. Batson*[19] the South Carolina Supreme Court abolished sovereign immunity for all cases filed after July, 1, 1986.[20] The

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on appeal, even if not raised at trial, where manifest injustice would result. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 256 (1981).

14. *Washington*, ___ S.C. at ___, 451 S.E.2d at 898 (citing Taylor v. Bridgebuilders, Inc., 275 S.C. 236, 269 S.E.2d 337 (1980)).

15. *Id.* at ___, 451 S.E.2d at 898. Previously, sovereign immunity was considered a question of subject matter jurisdiction that could be raised at any time up to, and including, appeal. *See* Lowry v. Commissioners of Sinking Fund, 25 S.C. 416, 420, 1 S.E. 141, 144 (1886); Hammarskold v. Bull, 43 S.C.L. (9 Rich.) 474, 482-83 (1856) (stating that a "[p]rivilege may be waived by neglect to plead it in due time; but an objection to the jurisdiction . . . is at all times fatal").

16. *Washington*, ___ S.C. at ___ & n.7, 451 S.E.2d at 898 & n.7 (citing, *inter alia*, Gavin v. City of New Haven, 445 A.2d 1 (Conn. 1982); Fitzpatrick v. City of Chicago, 492 N.E.2d 1292 (Ill. 1986); and Davis v. City of San Antonio, 752 S.W.2d 518 (Tex. 1988)). Other jurisdictions that have considered the issue in the same procedural posture have held that sovereign immunity, because it is a jurisdictional bar, cannot be waived by a failure to assert it as an affirmative defense. *See, e.g.*, Ramsey v. City of Forest Park, 418 S.E.2d 432, 433 (Ga. Ct. App. 1992); City of Lavergne v. Southern Silver, Inc., 872 S.W.2d 687, 690 (Tenn. Ct. App. 1993); *see also* 18 EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATION § 53.02.30 (1993) (cataloguing the jurisdictions which hold that any waiver of sovereign immunity must be express).

17. *Washington*, ___ S.C. at ___, 451 S.E.2d at 898.

18. *Id.* at ___, 451 S.E.2d at 903-04 (Littlejohn, J., dissenting).

19. 285 S.C. 243, 329 S.E.2d 741 (1985).

20. *Id.* at 246, 329 S.E.2d at 743. The *McCall* court expressly preserved immunity for all legislative, judicial, and executive officers vested with discretionary authority when acting in their

General Assembly responded by passing the South Carolina Tort Claims Act, which provides for a limited waiver of sovereign immunity while retaining the defense for discretionary acts of government officials.[21] Moreover, the General Assembly expressly excluded liability for punitive damages from its limited waiver of sovereign immunity.[22]

Recent South Carolina case law has reinforced this principle. In *Macmurphy v. South Carolina Department of Highways & Public Transportation*[23] the supreme court recognized that although *McCall* abolished sovereign immunity, it did not address the issue of punitive damages. The court concluded that *McCall* did not affect the rule that sovereign immunity precluded the recovery of punitive damages against a municipality.[24]

In *City of Newport*, a case which is factually similar to *Washington*, the United States Supreme Court held that a municipality cannot be assessed punitive damages under § 1983.[25] Actual and punitive damages under § 1983 were awarded against a municipality for its violations of a concert promoter's constitutional rights to free expression and due process in connection with the municipality's refusal to issue concert permits. The City failed to challenge the imposition of punitive damages until it made a motion for a new trial. The trial court noted that the city's objection was procedurally barred by Federal Rule of Civil Procedure 51.[26] Nevertheless, the trial court declined to rule on procedural grounds due to the novel federal law question. Instead, it held that a party can recover punitive damages against a municipality under § 1983.[27] The First Circuit affirmed the decision on procedural grounds. The Supreme Court reversed, holding that punitive damages were not recoverable against a municipality under § 1983.[28]

Justice Littlejohn also alluded to the fact that *Washington* can be criticized from a policy perspective. Punitive damages have been viewed as offering nothing by way of punishment and deterrence of future wrongdoing, but

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official capacities. *Id.* at 247, 329 S.E.2d at 743.

21. S.C. CODE ANN. § 15-78-60(5) (Law. Co-op. Supp. 1994).

22. *See* S.C. CODE ANN. § 15-78-120(b) (Law. Co-op. Supp. 1994).

23. 295 S.C. 49, 367 S.E.2d 150 (1988) (per curiam).

24. *Id.* at 51, 367 S.E.2d at 151 (citing Clarke v. City of Greer, 231 S.C. 327, 98 S.E.2d 751 (1957)). The *Macmurphy* court expressly stated that its decision in *McCall* did not overrule McKenzie v. McKenzie, 276 S.C. 461, 279 S.E.2d 609 (1981), which disallowed the recovery of punitive damages on the grounds of sovereign immunity. *McKenzie*, 276 S.C. at 462, 279 S.E.2d at 609-10. The *Macmurphy* court added: "There being no legislation or case law authorizing the recovery of punitive damages against the state or its agencies, we affirm the ruling of the circuit court [barring recovery of punitive damages]." *Macmurphy*, 295 S.C. at 51, 367 S.E.2d at 151.

25. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

26. FED. R. CIV. P. 51. The federal rule is identical to the South Carolina version of Rule 51.

27. *City of Newport*, 453 U.S. at 252-54.

28. *Id.* at 254, 271.

instead operating merely as a penalty placed upon the taxpaying general public:

> [I]t remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party . . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of services for the citizens footing the bill.[29]

In holding that sovereign immunity is an affirmative defense that must be pled to avoid its waiver, the *Washington* court apparently made a conscious decision to resolve the punitive damages issue on procedural grounds. Accordingly, the case is probably best viewed as an example of the court's willingness to demand stricter adherence to procedure. *Washington* should alert South Carolina attorneys to follow procedure to the letter and make a contemporaneous objection at trial if they expect an error to be reviewed on appeal. As a practical matter, however, the holding in *Washington* will have little effect in most tort suits against a municipality because South Carolina courts will continue to recognize that punitive damages cannot be assessed against a municipality based upon the doctrine of sovereign immunity so long as the issue is properly preserved for appeal by the careful practitioner.

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29. *Id.* at 267.